

A Draft is no Infringement

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In the last few weeks, and especially given the EU's remarkable success in keeping European annoyance at (alleged) British rule-breaking out of the negotiation room, little more has been said about the infringement action launched by the Commission against the UK at the beginning of October for failure to fulfil obligations under EU law in relation to the [Withdrawal Agreement](#). However, not only has this not gone away, but the recent ratcheting up of 'no deal' tensions means that a claim may soon be made on the so-called insurance policy (the controversial clauses in the [UK Internal Market Bill](#)), turning the threatened breach into an actual one. After the Bill becomes law, and assuming that the controversial clauses remain, a minister may use those clauses to pass a statutory instrument, for example, forbidding any checks to be carried out on goods travelling from Great Britain into Northern Ireland. Some would argue that the threat is bad enough and itself justifies an infringement action. That may be so. However, the Commission's action is still premature.

Let's have a quick recapitulation. On 9 September, the UK government tabled its Internal Market Bill. This contained a number of provisions that 'overwrite' the Protocol on Ireland/ Northern Ireland which is attached to the Withdrawal Agreement.

By these provisions, British ministers would be allowed to countermand EU law related to Northern Ireland, contrary to the Agreement's Article 4, which guarantees that related EU law would remain supreme. Despite being asked by the EU, the UK refused to withdraw the contested provisions by the end of September, which led, on 1 October, to the European Commission sending the UK a so-called 'letter of formal notice.' This is the first step in the EU's infringement procedure and, in addition to stating the Commission's belief that the UK is failing to fulfil its obligations under EU law (which continue through the transition period), the letter will also have set out in detail the alleged infraction. So far as we know from [a Commission press release](#), this is specifically the failure to withdraw the problematic provisions in the Internal Market Bill, but also more generally in relation to the implementation of the Withdrawal Agreement, the failure to act in good faith, as enshrined in Article 5. It should be noted that Article 5 is in broadly similar terms to [Article 4\(3\) of the Treaty on European Union](#), usually referred to as the principle of sincere cooperation. This could be important as, according to Article 87 of the Agreement, the Commission's power to sue the UK is only in relation to breaches 'under the Treaties or under Part Four of this Agreement.' Part Four, it should be observed, only covers Articles 126 to 132 inclusive. The Commission may thus still need a Treaty 'hook' on which to hang their alleged breach.

On receipt of the letter, the UK will have chance to convince the Commission that it is mistaken or to remedy the matter in a way that is satisfactory to the Commission.

Often infringement procedures end at this point. However, given the improbability of both outcomes, this conciliatory, administrative stage of the procedure could well evolve into a more serious, litigation stage. If the UK refuses to put an end to the infringement (be it the granting of the power to the minister or the minister's actual

use thereof), it will only remain for the Commission to definitively set out the ‘charge’ against the UK in a document called a ‘reasoned opinion.’ The reasoned opinion also sets a deadline by which the defendant State is expected to comply – on pain of a lawsuit – and this sets the clock counting down to a potential hearing at the Court of Justice. It is worth mentioning that at that stage the Commission could also apply to the Court to order the UK to suspend the legislation pending delivery of the judgment. The Withdrawal Agreement would then need to be complied with in full until the main proceedings were over.

So far so uncontroversial. However, in an [Order from 2000](#), the Court made it clear that draft measures may not be the object of infringement proceedings. The case *in quo* was an enforcement action brought by the Commission against the Netherlands in relation to some legislation about oysters. The Commission was concerned that this legislation might inhibit the free movement of goods from other oyster-producing Member States. However, thanks to arrangements under a famous law dating back to the creation of the Single Market in 1992, known as the ‘[Technical Standards Directive](#),’ the Commission’s preliminary comments on the matter related to the draft Dutch law, not the law as subsequently adopted. When the Commission attempted to convince the Court that these comments amounted to a letter of formal notice, thus initiating the infringement proceeding, the Court disagreed, stating that a letter of formal notice must allege a *prior* failure by the Member State concerned to fulfil an obligation owed by it. At the moment that the Netherlands received the Commission’s comments, the State ‘cannot have infringed Community law, since the measure exist[ed] only in draft form.’ The Court refused to countenance such a thing as ‘conditional formal notice,’ conditional that is on the draft law being passed unamended, as this would offend against legal certainty.

This Order is still good law and has been referred back to in a handful of subsequent cases, in various different contexts. As one of the Advocates General helpfully put it in [a proceeding against France](#), the infringement action is not a progressive procedure, but a repressive one.

Returning then to the current purported action against the UK, the conclusion must be that the Commission has jumped the gun, and that the action as it stands would not be admissible. The Court’s finding is clear – a breach of EU Law, if there is one, *follows* national promulgation – and this finding would apply wherever draft measures were impugned, as in the case of the UK Internal Market Bill. Could it be argued that, where a breach of the duty of good faith was alleged, this could occur earlier, for example, when the draft is published? This would be a stretch. Unless EU Law itself intrudes into what one might call the ‘pre-promulgation’ sphere, as for example where it imposes a notification requirement, then anything that happens in that sphere would normally be regarded as a matter of national competence only.

There is of course copious discussion in the literature about the doctrine of pre-emption. However, the most that could be said is that there may be a separate duty of *abstention* triggered by the passage of an act of Union law, but that this distinct duty of abstention would similarly only be breached on enactment, not on proposal.

Nor does this have to do with the question, alluded to several times at [second reading in the House of Commons](#), as to whether the UK would already be breaching

EU Law by providing ministers with the controversial override powers, or whether it would only be breaching EU Law as and when such powers were employed. The fact is that, even in the former case, a breach only occurs once the Internal Market Act (as it would then be) receives Royal Assent with that provision intact, and, with [second reading in the Lords](#) only having just begun on 19 October, this has clearly not happened yet.

